United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7632

In The

United States Court of Appeals

For The Second Circuit

JOSEPH A. LOUGHRAN, JR.,

Plaintiff-Appellant,

-against-

MICHAEL J. CODD, individually, as Police Commissioner of the Police Department of the City of New York, and as Executive Chairman of the Board of Trustees of the Police Pension Fund, Article II, GEORGE McCLANCY, individually and as Administrative Officer, Medical Section, New York City Police Department, STANLEY AUGUST, individually, and as District Surgeon of the New York City Police Department.

Defendants-Appellees.

B P/S

BRIEF FOR PLAINTIFF-APPELLANT

HAROLD B. FONER
IRA LEITEL *Of Counsel*
Attorneys for Plaintiff-Appellant
188 Montague Street
Brooklyn, New York 11201
(212) 624-5775

10352

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I. PRELIMINARY STATEMENT

Plaintiff-appellant, JOSEPH A. LOUGHRAN, JR., a police officer, commenced an action under the Civil Rights Act of 1871, 42 U.S.C. §1983 and 1985, challenging certain regulations promulgated by the Police Department of the City of New York, as well as the application thereof as administered by the defendants-appellees, police officials acting under their authority and the color of law.

By decision of Hon. Jacob Mishler, the defendants' motion for summary judgment was granted, the plaintiff's cross-motion denied, and the complaint dismissed.

II. ISSUES PRESENTED FOR REVIEW

1. Are the challenged regulations pursuant to which plaintiff had been confined to his residence under threat of fine or job dismissal constitutionally permissible?

2. Which standard, the compelling, substantial state-

interest or the irrational-arbitrary tests, should be applied in assessing the regulations' constitutional validity?

3. Do the interests sought to be promoted by the Department justify treating plaintiff's claim on a different constitutional plane than a private citizen's challenge?

4. Were the restrictions imposed on the exercise of plaintiff's constitutional rights reasonable?

5. Are the regulations overbroad; can the legitimate end be more narrowly achieved without stifling fundamental personal liberties?

6. Were the challenged regulations applied in an arbitrary, capricious or unreasonable manner, in violation of procedural due process of law?

III. STATEMENT OF THE CASE

Plaintiff, a former police officer in the Police Department of the City of New York (hereinafter referred

to as the "Department"), sought injunctive and declaratory relief, as well as monetary damages, for the alleged deprivation of his civil rights to travel and to personal liberty by Department officials.

Plaintiff attacked both the facial constitutionality and the arbitrary and capricious application of a Department Rule that prohibits a police officer on sick report from leaving his residence or place of confinement, except when given permission by his District Surgeon. (Appendix at 11).

Plaintiff, appointed to the Department on February 15, 1963, suffered a line of duty back injury in May, 1965 when he broke the fall of a man who had leaped from a train trestle. In late 1970, a non-service connected automobile accident caused re-injury to his back. Some six months later, plaintiff again suffered further injury to his lower back when he fell down a flight of stairs.

His aggravated condition caused his reassignment from full to restricted police duty by the Department's District Surgeon August, in March 1972. Further examinations in 1973-1974 by Department Honorary Orthopedic

Surgeons revealed chronic lumbosacral instability with nerve root irritation, and plaintiff was advised of the possibility of laminoctomy and fusion. As a result, plaintiff was assigned from restricted duty to sick report in February, 1975. Pursuant to the terms of contract, every police officer is entitled to unlimited sick leave with pay.

Pursuant to the challenged Department Rule, plaintiff was initially ordered confined to his residence, where he lives alone, all but three hours daily, seven days a week.

In March, 1975, plaintiff applied to and, after orthopedic examination, was accepted into a training and rehabilitative program offered by the Office of Vocational Rehabilitation of The University of the State of New York. Additionally, he continued under the care of his private physicians.

In March, 1975, plaintiff applied for disability retirement from the Department. After examination by the Department's Medical Board in September, 1975, it was reported that x-rays of the spine were within normal

limits although showing minimal narrowing of the lumbosacral interspace. Accordingly, at that time, plaintiff's application for disability retirement was disapproved.

At first, plaintiff's pleas to his District Surgeon to extend his hours of liberty were denied. But in late 1975 Dr. August increased the hours of authorized leave from the place of confinement from three to five hours daily.

Pursuant to the recommendation of his physician, plaintiff was admitted into Brooklyn Hospital where a lumbosacral myelogram was performed in January, 1976. This revealed a small midline epidural defect at L4-L5, and a prognosis of permanent partial disability.

Accordingly, plaintiff was re-examined by the Department's Medical Board in March, 1976 to determine his fitness to perform full police duty. Decision was deferred, however, pending a review of the actual films of the myelogram.

In this same month, March, 1976, the defendant McClancy, commanding officer of the Department's Medical Section, saw plaintiff's photo in a Department Bulletin

which indicated that plaintiff was Head Coach of the Department's Football Team. Without questioning the plaintiff, or prior medical consultation, the defendant McClancy unilaterally decided that such activity was inconsistent with a disability, and summarily ordered plaintiff's hours of liberty to be cut by 60%, from five to two hours daily, seven days a week. Defendant August, the District Surgeon, pursuant to McClancy's unilateral decree, issued the formal dictate thereafter reducing to two hours daily plaintiff's period of liberty. (Appendix at 41, paragraph 11 (3)). Plaintiff, in response, sought reinstitution of his previous hours by submitting a letter from his private doctor which recommended "conservatice therapy including ... swimming daily and walking daily." McClancy, without consulting either the District Surgeon or plaintiff's physician, summarily denied the request. (Appendix at 101).

Thereafter, police surveillance of plaintiff's residence increased, and plainclothes officers, both on foot and in unmarked patrol cars, were sent by McClancy to plaintiff's residence to verify that plaintiff was abiding by the new, yet more restrictive terms of his confinement. (Appendix at 101-02).

On April 5, 1976, plaintiff was again examined by the Medical Board. After studying the films of the myelogram performed in January, 1976, "evidence of a mild filling defect in the midline at the level of L4-L5 indicating probability of central disc herniation" was found. Nevertheless, final decision was again deferred pending further "electrodiagnostic studies and reexamination." (Appendix at 102).

Up until this time, charges had been preferred against plaintiff for having left the place of his confinement seven times during proscribed periods. If these charges were sustained, plaintiff was subject to dismissal from the Department, suspension and/or fine.

On April 28, 1976 the instant suit was filed.

On June 2, 1976 the Medical Board once again considered plaintiff's application for disability retirement. After noting that electrodiagnostic studies performed on plaintiff in Brooklyn Hospital "indicate suggestion of bilateral irritations of the lumbar 5 and sacral 1 roots", the Medical Board found that plaintiff was unable to perform police duty "due to a herniated disc," and granted plaintiff disability retirement.

Accordingly, the suit for injunctive relief was withdrawn, but plaintiff pressed his claim for declaratory relief and damages.

Based on affidavits of defendants McClancy, August and their counsel, defendants moved for summary judgment on May 20, 1976. They argued that "because of these very liberal sick leave benefits, the defendant feels that it has an obligation to encourage men on sick report to return to at least restricted duty"; and that the challenged rule had been "promulgated and enforced pursuant to (the) interest and obligation" to force or encourage the injured police officer to return to "at least restricted duty." (Appendix at 39, paragraphs 4-5; Appendix at 37, paragraph 3).

Plaintiff had never been charged by the Department with malingering or "goldbricking"; medical removal proceedings alleging his willful failure to perform police duties, pursuant to Section 434a-14.0 of the Administrative Code of the City of New York, had never been instituted against him.

Plaintiff cross-moved for summary judgment on June 3, 1976.

IV. THE DECISION BELOW

Judge Mishler reasoned that the threshhold question was whether the restrictions imposed on plaintiff were a constitutionally impermissible abridgement, under the due process clause, of his right to travel. (Appendix at 105).

In fashioning the proper standard for resolution of this issue, the District Court first noted that:

> "At first blush ... it would seem that a compelling state interest must be shown if the restrictions are to be found constitutionally permissible." (Appendix at 106)

But then, the Court observed, that as a police officer who, by contract, enjoyed unlimited sick leave with full pay, plaintiff's right to travel should be distinguished from that right accorded to the ordinary citizen. Since the Department retains "unique interests", in regulating the activities of its employees, restrictions on the activity of a member on sick report were necessary to prevent or minimize malingering. Hence, the Court ruled that the "compelling-state-interest test, which would be properly employed in the context

of a civilian complaint," was inapplicable herein. The proper standard of evaluation was found to be whether the Department regulation was so irrational, as to be arbitrary. (Appendix at 107-08).

Since the regulation was designed to minimize "goldbricking" and maintain "fiscal integrity" under the financial conditions that prevail in the City, the restriction was found to be reasonable. The burdens imposed on plaintiff by the restrictions were found not to have violated his substantive due process rights. (Appendix at 109, 112)

Next, the Court rejected plaintiff's claim that the absence of procedural safeguards and the manner in which the restrictions had been applied were violative of procedural due process. Instead, it was found that the initial restrictions imposed upon plaintiff, as well as the later, more restrictive unilateral decision, were not arbitrary and represented a balance between the need to promote plaintiff's expeditious return to work and his right to free time to pursue a rehabilitative schedule and to travel. (Appendix at 114-15). The Court found that the Department provided for weekly review of a confined police officer's medical progress before the imposition of restrictions, and for a trial

type hearing when an officer is charged with violating the terms of his confinement, and thus satisfied the requirements of procedural due process. (Appendix at 115-16).

V. POINT I

THE CHALLENGED REGULATION IS AN IMPERMISSIBLE ABRIDGEMENT OF PLAINTIFF'S CONSTITUTIONAL RIGHTS; IT BROADLY STIFLES FUNDAMENTAL LIBERTIES WHEN THE END CAN BE MORE NARROWLY ACHIEVED

Just as a convicted defendant still has constitutional rights when the prison gates close behind him, Burgin v. Henderson, 536 F.2d 501, 502-03 (2d Cir. 1976) and the cases cited therein, so, too, "a policeman is not required to shed his civil rights when he dons the blue uniform;" nor is he relegated "to a watered-down version of constitutional rights." Garrity v. New Jersey, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed2d 562 (1967).

In Burgin, supra, this Court considered the balance to be struck in the competing claims by prisoners to wear a beard based upon religious beliefs, and the state's interest in hygiene and identification of inmates.

Without deciding that question, and citing its holding in Sostre v. Preiser, 519 F.2d 763 (2d Cir. 1975), this Court pointed out the proper test to apply:

> "But even if the institutional purpose is legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. Shelton v. Tucker, 364 U.S.479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231 (1960). See also Procunier v. Martinez, 416 U.S.396, 413, 94 S.Ct. 1800 (1811), 40 L.Ed.2d 224 (1974)." Burgin v. Henderson, supra, 536 F.2d at 504.

This Court noted that claims by prisoners to wear prayer hats and grow beards were not absolute, particularly in a prison setting, but should nevertheless be judged on the standard articulated in Shelton v. Tucker, supra.

The legitimate Police Department interest of preventing abuse of a contract benefit (fiscal prudence) and allegedly fostering or encouraging an injured police officer's return to duty is not entitled to a greater presumption of constitutional validity than a state's concern with prison hygiene, identification and security (weapons concealed under hats). Why, then, apply the stricter

Shelton v. Tucker, supra, substantial interest test in Burgin to judge the infringement on the prisoners right to determining personal appearance upon religious beliefs, while applying the Kelley v. Johnson, 425 U.S.238, 96 S.Ct. 1440, 47 L.Ed.2d708 (1976) irrational test to judge a police officer's right to travel and to personal liberty?

Surely the legitimate state interest in Burgin is more critical than the legitimate interest in preventing "goldbricking" or malingering, relied upon by defendants herein. Nevertheless, this Court required that prison regulations not be overbroad, a requirement the District Court below felt unnecessary in applying the rational test to the regulations in question herein.

Kelley, however, upon which the District Court so heavily relied, can be distinguished on several bases.

Firstly, Kelley involved a claim of a less than fundamental right: of abridgement of the personal right to determine one's own personal appearance. As the District Court herein itself noted:

> "the Court in Kelley did admit that the liberty interest in matters of personal appearance was distinguishable from more

> fundamental rights ... and that it was still an open question as to whether grooming choices were protected by the fourteenth amendment. Kelley v. Johnson, 96 S.Ct. at 1444." (Appendix at 111)

Indeed, the decisions of several federal courts had previously applied less constitutional protection to claims involving personal appearance. Kinehart v. Brewer, 491 F.2d705 (8th Cir. 1974), aff'g per curiam, 360 F.Supp. 105 (S.D. Iowa 1973); Blake v. Pryse, 444 F.2d 218 (8th Cir. 1971), aff'g per curiam, 315 F.Supp.625 (D.Minn. 1970); Collins v. Haga,373 F.Supp.923 (W.D. Va 1974); Williams v. Batton, 342 F.Supp. 1110 (E.D.U.C. 1972).

The Court itself in Kelley noted that the type of "liberty" interest therein "implicates only the more general contours of the substantive liberty interest protected by the Fourteenth Amendment." Kelley, supra, 96 S.Ct. at 1445, In contrast, the interests sought to be protected herein - the right to travel and to personal liberty - lie in a different context, are more fundamental and demand a different process of analysis. This too was clearly recognized by Mr. Justice Powell in his concurring opinion in Kelley:

> "When the State has an interest in regulating one's personal appearance, ... there must be a weighing of the degree of infringement of the individual's liberty interest against the need for the regulation. This process of analysis justifies the application of a reasonable regulation to a uniformed police force that would be an impermissible intrusion upon liberty in a different context." Id. at 1447.

The rational test applied to a claim of right to choose one's own hair style in a uniformed police force, is clearly distinguishable from the liberty interest herein, which goes to the very heart of an individual's freedom with respect to matters basic to life and freedom. The right to travel and to personal liberty - in the context of a man confined to his home twenty-two hours a day, seven days a week - involves a substantial claim of infringement, and demands the application of the compelling or substantial interest test.

There can be no doubt, as the District Court itself found, that the rights asserted herein are fundamental liberties encompassed and protected by the Fourteenth Amendment, Meyer v. Nebraska, 262 U.S.390, 399, 43 S.Ct. 625, 626, 67 L.Ed.1042 (1923), and are thus entitled to more than the "ordinary, relaxed standard of review" conceived in Kelley. Williams v. Kleppe, 539 F.2d 803, 807 (5th Cir. 1976) (involving a right to bathe in the nude).

Secondly, the Court in Kelley saw the rule regulating hair styles as an aid in the promotion of safety of persons and property, goals "unquestionably at the core of the State's police power." Kelley, supra, 96 S.Ct. at 1445. The choice of organization, dress and equipment for enforcement personnel was found to be related to the promotion of safety of persons and property. Noting that the overwhelming majority of state and local police are uniformed, the Court held that this testified to the recognition that similarity in appearance of police officers is desirable "to make police officers readily recognizable to the members of the public, or a desire for the esprit de corps which such similarity is felt to inculcate within the police force itself." Id. at 1446. Thus, since these regulations were found, as noted, to promote "public safety" and to be at the core of the State's "police power," the test applied was whether the regulation was so irrational as to be branded arbitrary.

On the contrary, the rule confining a police officer to his home while on sick report is not designed as an aid to the promotion of safety of persons and property, or any other goal unquestionally at the core of the State's police power. This is not to say that the goal of encouraging fiscal prudence or preventing "goldbricking"

is not a legitimate state interest. Only that the application of the irrational test to a regulation at the core of the State's police power, does not justify its application to the type of interest the Police Department seeks to promote herein.

The Court of Appeals for the Fifth Circuit has recognized this distinction in Williams v. Kleppe, supra, 5[illegible] F.2d at 807, a post Kelley decision. The Court noted that if the interest in nude bathing were fundamental, an argument grounded in fiscal prudence to support a ban on this activity would be "inadequate, and defendants might be under a duty to demonstrate, by more specific data, the infeasibility of more selective solutions to the problems engendered by nude bathers." Id. The Court reiterated that the right to bathe in the nude at the Cape Cod Seashore National Park was not a fundamental right, noting that if it were, then "the government may not invade it absent compelling reason, and without exhaustion of less restrictive alternatives." Id.

Since the regulations challenged herein are purely internal procedures designed for fiscal prudence or to prevent the abuse of contract benefits, it is clearly distinguishable from regulations going to the method of organizing a police force or the promotion of safety of

persons and property, which, under Kelley, are entitled to greater deference and the application of the ordinary, relaxed standard of review known as the rational test.

In Connecticut S. Fed. of Tchrs. v. Bd. of Ed. Members, 538 F.2d 471, 481 (2d Cir. 1976), this Court noted that since the teachers "have numerous adequate, alternate opportunities to reach their desired audience," and "may discuss union related matters with each other before and after school and during mutual free periods and lunch," the denial of the right to post notices on the school bulletin boards, or to distribute notices through the teachers' mailboxes, was so inconsequential that it couldn't be considered an infringement of First Amendment rights of free speech, and was only a de minimis interferance with the exercise of associational rights. Thus, this Court applied a reasonable or rational test in weighing the competing interests. Id. at 478. Surely, however, the pervasive restrictions imposed herein upon an injured police officer on sick report, which prevented him from leaving his home 22 hours a day, seven days a week, was a substantial infringement on plaintiff's right to travel and to personal liberty, and clearly not de minimis.

In another post-Kelley decision, the Seventh Circuit in Div. 241 Amalgamated Transit U. (AFLCIO), v. Suscy, 538 F.2d 1264, 1266 (7th Cir. 1976) noted:

> "The test of constitutionality for invasions of a public employee's protected rights are derived from the nature of the rights involved."

The employee's protected rights therein - to privacy - were found to be protected only by the general ambit of the Fourteenth Amendment. Accordingly, the employer had

> "a paramount interest in protecting the public by insuring that bus and train operators are fit to perform their jobs. In view of this, members of plaintiff union can have no reasonable expectation of privacy with regard to submitting to blood and urine tests" Id. at 1267.

when they are involved in a serious accident, or are suspected of being intoxicated or under the influence of narcotics.

This "paramount interest" of the employer is absent herein, where the defendants' position and basis

for the infringement is

> "that the liberality underlying sick leave benefits commands that a mechanism be established to prevent abuse and foster the expeditious return to duty." (Appendix at 104).

While such interests are legitimate and reasonable, they are not compelling since they are not based on a need to protect the public safety or property, and are not at the core of the state's police powers, nor related to the enforcement of the laws.

Further, there are numerous and practical methods by which the Department can achieve this same, legitimate end without broadly stifling fundamental personal liberties. Burgin v Henderson, supra, 536 F.2d at 504, citing Shelton v. Tucker, supra, 364 U.S. at 488.

Pursuant to Section 75 of the Civil Service Law of the State of New York and Section 891 of the Unconsolidated Laws of New York, "removal proceedings" can be initiated to dismiss a police officer found to be incompetent to perform and/or in the performance of police duties. Indeed, under Chapter 22, Section 21.3 of the Rules and Regulations of the Department, such a mechanism has been

implemented whereby a police officer can be ordered to appear before a hearing officer to determine his fitness to continue as an employee of the Department. At such hearing the Department must only show by a preponderance of the credible evidence that the officer is incompetent to perform or in the performance of his duties. Malingers, "goldbrickers" or those in need of "encouragement" to return to duty have been repeatedly served with such a notice of removal proceedings. The burden of proof on the Department is slight, and pursuant to Section 434a-14.0 of the Administrative Code of the City of New York, and Section 75 of the Civil Service Law and Section 891 of the Unconsolidated Laws, the Police Commissioner is empowered to "remove" such an officer as an employee of the Police Department.

Such procedures, viable and in actual practice, can achieve the Department's legitimate purpose without broadly stifling fundamental personal liberties by virtually imprisoning a police officer on sick report. Talley v. California, 362 U.S.60 (1960).

In pursuing valid interests, the Police Department cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Department Regulations that affect constitutional rights must be drawn

with "precision" and must be "tailored" to serve their legitimate objectives. And if there are other, reasonable ways to achieve these goals with a lesser burden on constitutionally protected activity, the Department may not choose the way of greater interference. "If it acts at all, it must choose less drastic means." Dunn v. Blumstein, 405 U.S.330, 343 (1972); see also Memorial Hospital v. Maricopa County, _____U.S._____, 39 L.Ed.2d 306, 320 (1974); Covington v. Harris, 419 F.2d 617, 623 (D.C. Cir. 1969); Rhem v. Malcolm, 371 F.Supp. 594 (S.D.N.Y. 1974).

VI . POINT II

THE REGULATION IN QUESTION IS APPLIED IN AN ARBITRARY AND CAPRICIOUS MANNER, AND WITHOUT ANY PROCEDURAL SAFEGUARDS.

Both the Supreme Court and this Court have held that the manner in which otherwise permissible administrative regulations are applied, must be judged in determining the constitutionality of such regulations. See Broadrick v. Oklahoma, 413 U.S. 601, 617-18, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973); Law Students Research Council v. Wadmond, 401 U.S. 154, 162-63, 91 S.Ct. 720, 27 L.Ed.2d 749 (1971); Schwartz v. Romnes, 495 F.2d 844, 852

(2d Cir. 1974).

Further, the manner in which such regulations are implemented, and the conditions under which they are applied are proper and necessary considerations for judicial review. Cupp v. Murphy, 412 U.S. 291, 295, 93 S.Ct. 2000, 36 L.Ed.2d 900; Wyman v. James, 400 U.S. 309, 318, 91 S.Ct. 381, 27 L.Ed.2d 408; Schmerber v. California, 384 U.S.757, 771, 86 S.Ct. 1826; Div. 241 Amalgamated Transit U. (AFL-CIO), v. Suscy, supra.

Yet, concededly, there are no standards whatever for the application of these regulations, and no review provided of the implementation or conditions thereof. Without such procedural safeguards a police officer or any other citizen cannot be deprived of "liberty" even when the state's purpose is benign. In re Gault, 387 U.S.1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967).

The Police Department regulations pursuant to which plaintiff is confined, Rules and Procedures 22/2.1 and Patrol Guide 120-1, page 1, para. 5, make no reference whatsoever to procedural safeguards or standards. A member of the force on sick report "shall not leave his residence or other authorized place of confinement except

by permission of his district surgeon or for the purpose of visiting a police surgeon." No standards or guidelines exist for the district surgeon to prepare and issue Form M.B.5 (Permission to Leave Residence While on Sick Report). In practice, the decisions are made at the whim of the particular district surgeon or medical section commander.

Such regulations and practices, devoid as they are of reasonableness and procedural safeguards, are per se unconstitutional. However, attractive (avoiding malingering or goldbricking) the end to be achieved by the Police Department in confining members of the force to their homes, the means employed "must hoard constitutional values." Barnett v. Rodgers, 410 F.2d 995 (D.C. Cir. 1969).

To argue, as the District Court did, that the fact that plaintiff or his private physician were free to write his district surgeon to complain of the terms of his confinement, satisfies procedural due process of law, should be rejected. (Appendix at 114). Since there was no procedure whereby the conditions imposed on his confinement by either the district surgeon or medical section commander could be reviewed by anyone else, the decision makers were free, as they in fact did, to ignore plaintiff's complaints and pleas. There is no pro-

vision in such regulations or practice for anyone to review or pass upon the conditions of confinement imposed upon police officers.

The District Court held that since McClancy's (the Medical Section Commander) suspicions of plaintiff's disability for the performance of police duty were justifiably aroused, he could permissibly cut plaintiff's hours of liberty from five hours daily to two hours, unilaterally, and without prior medical review or consultation. (Appendix at 115). Although the Department's own regulations provide that the District Surgeon shall determine the hours of confinement (Appendix at 11), McClancy acknowledges in his affidavit that he alone suddenly ordered a 60% cut in plaintiff's hours of liberty, and merely informed the District Surgeon, thereafter, of his decision. (Appendex at 41, paragraph 11 (3)). He admits taking such action based only upon something he saw in a Department Bulletin, and without having verified the accuracy thereof with plaintiff or anyone else. Id.

There was no procedure by which plaintiff could seek review of such decision. He was only free to com-

plain to those who made the decisions he sought to challenge.

Plaintiff does not contend that he is entitled to a trial type hearing to determine the terms and conditions of his confinement. He merely argues that the total lack of any safeguards or procedures to review the decision of the district surgeon or the usurpation of those powers by the medical section commander, by any medical board or other authority is constitutionally impermissible.

A Police Officer's terms of confinement are subject to the worst sort of whimsical decision making, and he has no one to complain to or seek review from, other than those persons whose decisions he seeks to challenge.

The District Court's reasoning that a trial type hearing would serve no purpose (Appendix at 114) is a "straw-man" argument. Plaintiff never argued that he was entitled to such; only that the lack of any manner to review or challenge the terms of confinement, made on otherwise possibly permissible restraint, impermissible.

After taking testimony on actual police practice when special permission to leave the place of confinement is requested, in a case substantially identical to that herein, the late Judge Judd found, in Gissi v. Codd, 391 F.Supp. 1333, 1335-36 (E.D.N.Y. 1974):

> "Permission to visit his children has often been denied by the Central Sick Desk, and efforts to reach Captain Hall (defendant McClancy's predeceasor) for review of the Sick Desk decisions have met with frequent frustration. The only standards for the granting of permission from the Sick Desk (to leave one's place of confinement) are that the decision be 'reasonable' and is subject to review. In practice, the decisions are made at the whim of the particular sergeant on the Central Sick Desk. (Emphasis added).
> ..."Lord Acton's famous dictum that 'power tends to corrupt' poses a real risk of power being abused when a working police sergeant is given power to regulate the comings and going of a non-working policeman, with no other standard than to be 'reasonable.'"

At least Gissi could ask Captain Hall to review the decisions of the officer on the Sick Desk on special requests to leave the place of confinement. Loughran had no one to whom he could complain of the decisions of his District Surgeon or of the usurpation of that medical power by the medical section commander, concerning

the conditions and terms of his confinement.

The District Court herein, on the affidavits of defendants McClancy (Appendix at 38), Dr. August (Appendix at 73) and their counsel (Appendix at 36), and without taking testimony, granted defendants' motion for summary judgment finding compliance with procedural due process.

The District Court found that plaintiff "was examined by the defendants weekly, had his case reviewed after each visit." (Appendix at 113). The Court also found that "plaintiff could only have been penalized or dismissed for violation of the confinement order. If charges were brought, Loughran then would have been accorded a trial type hearing." (Appendix at 115). Thus the Court concluded:

> "Such a scheme which provides for weekly review of a member's medical progress before the imposition of restrictions and for a trial type hearing when an officer is cited for violating a confinement order satisfies the requirements of procedural due process." (Appendix at 115-16).

The Courts conclusion was wrong, because the facts

upon which it reasoned were incorrect.

The cryptic and carefully worded affidavit of the District Surgeon states only that Loughran"reported"to his office on an approximate weekly basis. (Appendix at 73-74). There is nothing about a weekly evaulation of the terms of confinement, no reason or explanation is given as to why plaintiff's five hours of liberty were cut to two on the orders of McClancy, and no statement to the effect that this restriction was for purposes of rehabilitation or recuperation. Further, there is no indication of any procedure for challenging the District Surgeon's decisions, or what body or person reviews his determinations.

Secondly, when a police officer is charged with having violated the terms of his confinement at a trial type hearing, the terms or appropriateness of his confinement are not in issue. It is no part of such proceeding to examine the reasons for or appropriateness of the conditions of confinement. There is no evidence or statement in the affidavits submitted in support of defendants' motion for summary judgment on this issue. At such hearing, the Department must only prove by sub-

stantial evidence that the police officer violated the terms of his confinement by leaving his residence without permission and during a proscribed time. A defense seeking to challenge the need, appropriateness, terms or conditions of confinement would be impermissible. Once the violation of the confinement order is established, the only issue remaining is the penalty to be imposed - fine, suspension or job dismissal. See Matter of La Rosa v. Police Department of the City of New York, N.Y. L.J. (January 31, 1977 at P. 5, col. 2) (App.Div. First Dept.).

Without any evidence to support its conclusion, the District Court incorrectly assumed that at least prior to the imposition of penalty, there would be a review of the need for, and conditions and terms of confinement.

As McClancy noted in his affidavit, (Appendix at 39, paragraph 5): "The terms of the Permission to Leave Residence While on Sick Report vary in each case. ..." Since there is no structure, procedure or safeguard either in the Department's regulations or practices to safeguard or prevent abuses, the regulations, as applied, are per se unconstitutional.

VII . CONCLUSION

The judgment appealed from granting defendants' motion for summary judgment and denying plaintiff's cross-motion therefor should be reversed. Alternately, the judgment appealed from should be reversed, and the proceedings remanded to the District Court for a hearing on the issues of the application of the regulation in question, and the existence of procedural safeguards to prevent abuse thereof, or the existence of alternate means to achieve the same legitimate end.

Respectfully submitted,

HAROLD B. FONER
IRA LEITEL, of Counsel
Attorneys for Plaintiff-
Appellant

A 202 Affidavit of Personal Service of Papers

LUTZ APPELLATE PRINTERS, INC.

APP
FEDERAL COURT OF APPEALS
SECOND CIRCUIT

JOSEPH A. LOUGHRAN, JR.,
Plaintiff-Appellant,

against

MICHAEL J. CODD, ind., as Police Comm. of Poliace Dept. of City of N.Y., and as Exec. Chairman of Bd. of Trustees of the Police Pension Fund, Art. II, GEORGE MC CLANCY, ind, and as Admin. Off, Med. Sec. NYC Police Dept. STANLEY AUGUST, ind, and as Dist. Surgeon of the N.Y. City Police Dept.
Defendants-Appellees.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Victor Ortega, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1027 Avenue St. John, Bronx, New York

That on the 3 *day of* Feb *1977 at* Municipal Building New York, N.Y.

deponent served the annexed Brief

W. Bernard Richland *upon*

the *in this action by delivering* 2 *true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) *herein,*

Sworn to before me, this 3
day of Feb *1977*

Robert T. Brin

Victor Ortega

VICTOR ORTEGA

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977